BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA E. RUBALCAVA	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,943
HILAND DAIRY COMPANY	)	
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 22, 1999 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Wichita, Kansas, on November 12, 1999.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for overuse injuries to both upper extremities. In the Application for Hearing filed with the Division of Workers Compensation on March 30, 1998, claimant alleged a series of accidents from "October 20, 1997 and every day thereafter."

In deciding this claim, the Judge found (1) the appropriate date of accident was December 24, 1997, when claimant was first given medical restrictions; (2) the average weekly wage for this series of accidents was $711.84; and (3) claimant had a 26 percent

task loss and a 34 percent wage loss, which created a 30 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Frobish erred. They argue that the appropriate date of accident should be the last day of work before claimant underwent the first of two upper extremity surgeries. Therefore, they argue that the date of accident should be June 21, 1998, which would yield an average weekly wage of $526.68. Because of that reduced average weekly wage, respondent and its insurance carrier contend that the difference in claimant's pre- and post-injury wages is less than 10 percent. Therefore, they argue that claimant's permanent partial benefits should be limited to Dr. Melhorn's 10 percent whole body functional impairment rating.

Conversely, claimant argues that the Judge's findings and conclusions are well supported by the record and should be affirmed. In the alternative, claimant suggests that the appropriate date of accident could be March 17, 1998, as that is the approximate date that claimant's job substantially changed as her overtime hours were significantly reduced to almost none.

The issues before the Board on this appeal are:

1. What is the appropriate date of accident for the overuse injury that claimant sustained?

2. What is the appropriate average weekly wage for this series of accidents?

3. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant began working for respondent's dairy on October 21, 1996. Claimant was hired as a break relief person who would operate various machines that were involved in the milk packaging process when the regular operator would take a break. When claimant was not operating a machine, she would wash equipment. Eventually, claimant became the gallon machine operator. In those jobs, claimant regularly worked between 12 and 17 hours per day.

2. Approximately one month into her job, claimant began to experience numbness and tingling in both hands. Despite those symptoms and a November 30, 1996 car wreck, claimant continued to work. In January 1997, claimant's symptoms increased. Claimant told her supervisors about her symptoms.

3. In early January 1997, claimant saw Dr. Poling with complaints that her hands were falling asleep and she couldn't open bottles. Unaware the symptoms were related to work, claimant related the symptoms to the November 1996 automobile accident.

4. By March 1997, claimant had become the gallon machine operator. While doing that job, claimant's symptoms increased as she was losing strength and coworkers would have to help her tighten clamps and hook up pipes.

5. Automobile insurance paid for claimant's medical treatment for her hands and arms until October 1997 when she saw Dr. Tyrone Artz who determined that claimant was developing carpal tunnel and possibly ulnar nerve compression.

6. In December 1997, claimant advised respondent that she had carpal tunnel syndrome. Respondent then referred claimant for medical treatment. Respondent modified the gallon machine job and, despite wearing braces and having medical restrictions, claimant continued to work 50 to 70 hours per week.

7. On March 10, 1998, claimant began treating with board-certified orthopedic surgeon J. Mark Melhorn, M.D. The doctor diagnosed left elbow ulnar nerve entrapment and bilateral carpal tunnel syndrome. The doctor initially tried conservative treatment.

8. Claimant was off work for an unrelated medical problem from January 27, 1998, through March 15, 1998. Claimant returned to work on March 16, 1998, and worked several hours of overtime. The next day, claimant saw Dr. Melhorn who determined that claimant had lost strength in her hands. Although the doctor did not restrict claimant from performing any specific type of work, he restricted her from working overtime as he limited her to working eight hours per day and 40 hours per week. That restriction took effect on March 17, 1998, and remained in effect until June 22, 1998, the date of her first surgery.[1]

9. After trying a course of conservative treatment, Dr. Melhorn recommended surgery. Claimant worked her regular job as a gallon machine operator through June 21, 1998, when she left work for left carpal tunnel and left ulnar nerve surgery that was scheduled for the following day. That was the first instance that claimant missed a full day or more of work because of her bilateral upper extremity injuries. Before leaving work for surgery, claimant was earning $11.10 per hour.

10. Approximately two days after the left hand and elbow surgery, claimant returned to work on light duty and returned to the gallon machine. While taking a codeine-based

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[1] Claimant first testified that Dr. Melhorn restricted her from working overtime on March 17, 1998. But claimant also testified that respondent did not permit her to work overtime after she gave a statement to an insurance claims adjuster on January 12, 1998. See Regular Hearing, March 30, 1999; p. 29.

medication, claimant fell at work and hit her head. Dr. Melhorn then advised claimant not to work around the machinery.

11. In early July 1998, Dr. Melhorn operated on claimant's right hand. After that surgery, respondent moved claimant to the lab. At the time of the March 1999 regular hearing, claimant remained in the lab where she was earning $10.85 per hour and working approximately two hours of overtime per week.

12. Dr. Melhorn treated claimant until September 1, 1998, when he determined that she had reached maximum medical recovery. Using the fourth edition of the AMA *Guides to the Evaluation of Permanent Impairment*, Dr. Melhorn rated claimant's whole body functional impairment at 10 percent and released her to regular duties as a lab assistant. When asked what specific work restrictions claimant should observe, the doctor stated:

> In general, I would consider a medium level of work, maximum of 50 pound lift, 25 to 35 pounds frequent, and that she would have task rotation within that.
>
> . . .
>
> If she returned to a job that might have high power vibratory tools or a cold environment, we might want to consider adding specific restrictions for that.[2]

Additionally, the doctor believes claimant should be restricted from performing repetitive tasks more than six hours per eight-hour day. Finally, although Dr. Melhorn would not make it a specific work restriction, he recommends that claimant limit her working to five days and 40 hours per week.

13. Dr. Melhorn reviewed a list containing 27 work tasks that claimant performed in the 15-year period before she developed the bilateral upper extremity injuries. The doctor testified that claimant probably lost the ability to perform seven of the 27 work tasks as a result of the injuries to her upper extremities. Based upon that evidence, the Judge found that claimant sustained a 26 percent task loss. At oral argument before the Appeals Board, respondent and its insurance carrier did not contest that finding. Therefore, the Board affirms the Judge's task loss finding and adopts it as its own.

14. Claimant's average weekly wage for this series of accidents is $675.08. For the six-month period before March 16, 1998, claimant averaged approximately $231.08 per week in overtime. That figure was computed by excluding both partial weeks and those weeks

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[2] Deposition of J. Mark Melhorn, M.D., April 1, 1999; pp. 7 and 8.

that claimant did not work because of the unrelated health problem.[3] Adding the weekly overtime earnings with the weekly $444 straight time earnings equals $675.08.

15. At the March 1999 regular hearing, claimant testified that she was earning $10.85 per hour straight time and working approximately two hours per week overtime. Based upon that evidence, the Appeals Board finds that claimant's post-injury wage equals $466.55. Therefore, there is a 31 percent difference in claimant's pre- and post-injury wages.

CONCLUSIONS OF LAW

1. The Appeals Board concludes that the most appropriate date of accident for this series of micro-traumas is March 16, 1998, which is the last day claimant worked before her job significantly changed due to her reduced overtime hours.

2. Following creation of the bright line rule in the 1994 *Berry*[4] decision, the appellate courts have struggled and grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[5] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her

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[3] Because respondent's pay periods do not exactly correspond with the 26-week period that is used to compute claimant's average overtime, the first and last pay periods that contain the starting and ending dates for the six-month period preceding the date of accident are considered partial weeks. A third partial week exists as claimant left work in January 1998 in approximately the middle of a pay period for unrelated medical reasons. After excluding those three partial weeks, and after excluding the six full weeks that claimant did not work because of the unrelated medical problem, the pay records show that claimant earned $3,928.33 in overtime during the remaining 17 weeks. Dividing $3,928.33 of overtime by 17 equals $231.08.

[4] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[5] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

> employer or is unable to continue a particular job and moves to an accommodated position.[6]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[7]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

3. The Appeals Board concludes that decreasing claimant's overtime to a minimum after March 16, 1998, is the equivalent of the substantial change of work duties contemplated by *Treaster.* To find otherwise ignores the contribution that claimant's substantial overtime work contributed to the injury and would permit the employer to control both the accident date and average weekly wage, which *Treaster* intended to prevent. In this instance, justice requires that claimant's overtime be included in the average weekly wage computation.

Although it could be argued that *Treaster* supports a date of accident later than March 16, 1998, such a finding would ignore the fact that, if claimed, following March 16, 1998, claimant would have been eligible to receive temporary partial disability benefits for the bilateral upper extremity injuries based on the reduced average weekly wage. The Act provides:

> Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto.[8]

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[6] *Treaster*, syl. 3.

[7] *Treaster,* syl. 4.

[8] K.S.A. 1997 Supp. 44-510e(a).

4. Because hers is an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Court held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . (*Copeland*, p. 320.)

5. Respondent returned claimant to work in a job where she now earns $466.55 per week. Claimant's return to work for respondent satisfies the requirement that claimant make a good faith effort to return to appropriate employment. Comparing claimant's $675.08 pre-injury wage to her $466.55 post-injury wage, the Appeals Board concludes that claimant has a 31 percent wage loss.

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[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. Averaging the 31 percent wage loss with the 26 percent task loss, the Appeals Board finds that claimant has a 29 percent permanent partial general disability.

AWARD

WHEREFORE, the Appeals Board modifies the June 22, 1999 Award by finding the appropriate date of accident is March 16, 1998, and by finding the permanent partial general disability is 29 percent.

Maria E. Rubalcava is granted compensation from Hiland Dairy Company and its insurance carrier for a March 16, 1998 accident and resulting disability. Based upon an average weekly wage of $675.08, Ms. Rubalcava is entitled to receive 120.35 weeks of permanent partial general disability benefits at $351 per week, or $42,242.85, for a 29 percent permanent partial general disability.

As of May 1, 2000, there would be due and owing to the claimant 111 weeks of permanent partial compensation at $351 per week in the sum of $38,961, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $3,281.85 shall be paid at $351 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul V. Dugan, Jr., Wichita, KS
Jeffery R. Brewer, Wichita, KS

Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director